United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2583

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOCKET NO. 74-2583

SHELDON S. TURNER,

Defendant-Appellant,

—VS.—

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

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STATUTE INVOLVED

§1014. Loan and credit applications generally; renewals and discounts, crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal Intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131 to 1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation or the Administrator of the National Credit Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change of extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years or both.

As amended Oct. 19, 1970, Pub.L. 91-468, §7, 84 Stat. 1017; Dec. 31, 1970, Pub.L. 91-609, Title IX, §915, 84 Stat. 1815.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	)	Docket No. 74-8350
Plaintiff/Appellee,	)	
v.	)	
SHELDON S. TURNER,	)	
Defendant/Appellant.	)	

BRIEF OF APPELLANT

Preliminary Statement

Appellant, SHELDON S. TURNER, appeals from a judgment of the United States District Court for the Southern District of New York, rendered November 1, 1974, convicting him of making three false statements in separate schedules of assigned receivables (Counts 2, 3 and 11) to a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, §1014, and sentencing him to eighteen months' confinement (six months on each count, each consecutive to the other) and to pay a fine of $6,000.00 ($2,000.00 as to each count).

This action was tried to a jury on August 20, 23, 26, 1974 before the Honorable Robert L. Carter. Of the original nineteen counts alleged, four were dismissed at the Government's request prior to the close of its case (App. 113) and the Appellant was acquitted of twelve others. The other two defendants were acquitted of all counts pertaining to them. The trial court denied the Appellant admission to bail pending appeal, a notice of which was filed November 4, 1974.

STATEMENT OF FACTS

Except as written in support of a particular point below, the facts adduced at trial are essentially these. On January 25, 1971 the Appellant, as president of York Litho Corporation of America, executed a security agreement with the Dommerich Division of the Chemical Bank (App. 181). This agreement succeeded a pre-existing agreement between the parties signed by York's owner (App. 190), and assumed the pre-existing debts and liabilities of York, a loan executed that date for $60,000 (App. 185) and all future advances made by the Dommerich Division of the bank (App. 181).

The security or collateral York posted for the loan and future advances included its equipment, furniture, tools, dies, jigs and attachments as well as accounts receivable (App. 181, 189). Like the equipment security agreement, the accounts receivable agreement was a continuation by York of a pre-existing arrangement between the corporation and the Dommerich Division (App. 189) that commenced while Dommerich was a privately owned concern totally unconnected with any banks whose deposits are insured by the Federal Deposit Insurance Corporation (App. 189, 132). Indeed, the parties considered the Accounts Receivable Financing Agreement as commencing in 1961, some seven years before Dommerich was acquired by Chemical Bank (App. 186, 3-4, 132).

In September, 1971 the Appellant purchased York's stock from its former owner.

Between on or about January, 1972 and the time York closed in early May, 1972 (App. 135) the Government alleged some nineteen falsified schedules of assigned accounts receivable were forwarded or caused to be forwarded to Dommerich Division by the Appellant (App. 5-6, 144) and based on those schedules the Dommerich Division advanced money to York in l[illegible] Its

alleged proof thereof was provided through the following evidence.

Seymour Maselow, Assistant Secretary at Dommerich Division explained the procedure for handling schedules of assigned receivables made by York during the period of time covered by the indictment. Herein his testimony pertains to the three counts which the Appellant now appeals. He said,

> "...York Lito (sic) Corporation of America would fill out the schedule showing the customers that they purportedly sold to and would send the schedule by mail to our office."

(Emphasis added)(App. 6). He further stated that the assignments and the sales invoices attached to it constituted the security for the monetary advances to York (App. 8).

In January, 1972 the Dommerich Division sent a representative to the York premises in Miami for approximately two months when York became a debtor-in-possession (App. 133). Following that representative's departure from the York premises, Mr. Maselow personally travelled to Miami and while there conversed with the Appellant during the former's three-day stay (App. 9). According to Mr. Maselow, the Appellant showed him which

assigned receivables could not be collected by Dommerich Division because they were billed but not shipped or previously collected by York directly (App. 11). Mr. Maselow's attention was thereafter directed to his notes taken during his trip to the York premises (App. 13-15) and admitted by the court as the witness' past recollection recorded (App. 134). In it Mr. Maselow identified with the letter "A" those receivables on which Dommerich Division could not perfect collection because, "the merchandise...was actually not shipped, or not billed to the customer" (App. 16). At no time in talking to or dealing with the Appellant did Mr. Maselow ask him what happened to the goods that were not shipped (TR.98).

In those same notes Mr. Maselow identified the word "contra" next to the name of "Leigh Robins," one of York's accounts and explained that the term meant the account could not be collected in full because of some relation between the account and York (App. 23-24)[1/].

1/ The three counts of which the Appellant was convicted are listed on Mr. Maselow's notes (App. 147): the second, twenty-second and twenty-third entries. The twenty-second entry, "Leigh Robins," does not contain the letter "A" next to it.

There was and is no letter "A" next to the entry in his notes, however, (App. 147) and Mr. Maselow's notes reveal which receivables the Appellant described as "no good or he collected the money for, or there was a production problem" (App. 27).

Finally, Mr. Maselow testified that Government Exhibit 209 (App. 188) reflected the Dommerich Division business record of York's accounts receivable record. The document was maintained at the bank's New York office and all entries placed thereon were made by the bank's personnel based on instructions from himself, the account executive or the particular officer handling the York account (App. 40). The exhibit reflected the Leigh Robins account "zeroed" out with no balance due on May 3, 1972.

Con Roberts Little, Jr. testified relative to Count 2 of the indictment. His company, Little and Co., Incorporated, was a manufacturer's agent selling supplies and especially labels to Florida's citrus industry (App. 136). Mr. Little's customers would order the labels from York by giving him the order and he would send the order on to York (App. 137).

On one occasion Little and Co., Incorporated was billed directly by York for such a transaction (App. 137). That invoice, Government Exhibit 28-A (App. 179), was the subject of a memorandum from Mr. Little to the Appellant requesting that the amount reflected in the accompanying invoice be cleared from York's books (App. 29). That invoice, however, does not relate to the documentation admitted in support of count two of the indictment.

The exhibits allegedly supporting the indictment's second count (App. 151, 155, 157, 158, 160) could have been sent to Little and Co. in December, 1971. Indeed on cross-examination Mr. Little testified that he received a billing in December, 1971 when he commenced business with York, he had no way of knowing whether the invoice was an error or misunderstanding between him and York and that when he used the word "invalid" he did not mean it was false, but rather a misunderstanding over who was to be billed (App. 31, 32).

And Rose Stephenson testified that Mr. Little told her that he would be billed by York for merchandise she ordered and this was the original working agreement between them until December, when Mr. Little

informed her that she would be billed direct from York (App. 35-39). All purchase orders, however, went through Mr. Little (App. 39).

Testimony relative to the assignment of receivables from Leigh Robins and The Adding Machine pertain to counts three and eleven and was adduced from Miss April Martin, also known as April Kelly (App. 51). Originally hired as an art director for The Adding Machine (App. 58) who began her work at the Leigh Robins premises, (App. 58), Miss Kelly soon moved to the York premises, along with the Appellant and others (App. 59). She worked at the York premises from October, 1971 to April, 1972 (Id). The Adding Machine, for all practical purposes, was an in-house subsidiary of York.[2/] When new jobs came in and needed conception the work went to The Adding Machine (App. 61).

While located at the York plant Miss Kelly reported routinely to one of the other defendants acquitted below, but none of those reports referenced any purchases from York by The Adding Machine (App. 60). Miss Kelly also

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2/ York was in the printing business (App. 141) while Leigh Robins concentrated in graphics (App. 56).

testified that while at York she forged numerous delivery tickets which were prepared at the same time invoices were typed (App. 67, 71-73, 66, 143) although invoices were prepared only after an order was received (App. 65, 79).[3/] She also kept delivery tickets in her desk but of all the purported customers named thereon she can only recall The Adding Machine (App. 74).

Moreover, Miss Kelly could not testify that there were any false, forged or phony invoices prepared at or forwarded by York (App. 81).[4/]

3/ The Government conceded there were no invoices sent to the bank before an order came in from a customer (App. 80).

4/ Miss Kelly and Mr. Driggers both testified they forged delivery tickets but no exhibits were identified by either of them. See TR generally and App. 112.

STATEMENT OF ISSUES

I.

WAS THE COURT'S INSTRUCTON ON "BONA FIDE OBLIGATION" TANTAMOUNT TO A DIRECTED VERDICT OF GUILTY AS TO ANY BILLING FOR WORK IN PROGRESS UNDER AN EXISTING OBLIGATION DONE BY YORK LITHO CORP. OF AMERICA; DID SUCH AN INSTRUCTION AMOUNT TO PLAIN ERROR AND DENY THE APPELLANT DUE PROCESS OF LAW AND A FAIR TRIAL?

II.

WAS THE GOVERNMENT'S KNOWING USE OF UNDERCOVER "AGENTS" TO SURREPTITIOUSLY ABSCOND WITH DOCUMENTS BELONGING TO YORK LITHO CORP. OF AMERICA WITHOUT A WARRANT TO SEARCH OR OTHER LEGAL BASIS TO SEIZE SUCH DOCUMENTS MISCONDUCT OF SUCH MAGNITUDE AS TO DEPRIVE THE APPELLANT OF DUE PROCESS OF LAW AND REQUIRE SUPPRESSION OF THE TAINTED EVIDENCE AND REVERSAL?

III.

DID THE COURT'S FAILURE TO INSTRUCT ON THE DEFINITION OF "FALSE" AS IT IS USED IN THE PHRASE "FALSE STATEMENT OR REPORT" LEAVE UNDEFINED A CRITICAL AND ESSENTIAL PHRASE IN THE LAW APPLICABLE TO THE FACTS AND ISSUES AT BAR AND DEPRIVE THE APPELLANT OF DUE PROCESS OF LAW AND A FAIR TRIAL?

IV.

DID THE COURT ERR TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT AND DENY HIM DUE PROCESS OF LAW AND A FAIR TRIAL BY NOT INSTRUCTING THE JURY ON "ACCOMPLICE TESTIMONY" OF APRIL (KELLY) MARTIN AND WILLIAM DRIGGERS?

V.

DID THE KNOWING USE OF UNFAIR, BAD FAITH CROSS-EXAMINATION OF A DEFENSE CHARACTER WITNESS AND THE INCLUSION OF PREJUDICIALLY INFLAMMATORY AND IRRELEVANT COMMENTS IN CLOSING ARGUMENT AMOUNT TO SUFFICIENT PROSECUTORIAL MISCONDUCT AS TO DENY THE APPELLANT DUE PROCESS OF LAW AND A FAIR TRIAL?

VI.

UNDER THE FACTS OF THIS CASE DID THE COURT LACK JURISDICTION OVER THE SUBJECT MATTER OF THE ALLEGED OFFENSE?

ARGUMENT

POINT I.

THE COURT'S INSTRUCTION ON "BONA FIDE OBLIGATION" WAS TANTAMOUNT TO A DIRECTED VERDICT OF GUILTY AS TO ANY BILLING FOR WORK IN PROGRESS UNDER AN EXISTING OBLIGATION DONE BY YORK LITHO CORP. OF AMERICA; SUCH AN INSTRUCTION AMOUNTED TO PLAIN ERROR AND DENIED THE APPELLANT DUE PROCESS OF LAW AND A FAIR TRIAL.

Before the jury retired to deliberate the court instructed them on the law pertinent to the facts and issues in the cause. In doing so it defined "bona fide obligation" thusly at App. 130, 131:

> "Now a 'bona fide obligation' means a good faith obligation. It means that the customer actually did agree to pay the amount shown, and that York litho actually did intend to hold him to that obligation. I shall now discuss the meaning of an 'existing obligation.'

> "As a matter of commercial law, normally a customer is not obligated to pay a bill until the merchandise has been delivered to him, unless he agrees to be billed on some other basis. Accordingly, even if York Litho received a bona fide order from a customer, it would be a 'false statement' to submit a schedule containing that order if the merchandise had not yet been delivered to the customer, unless the customer agreed to be billed on some other basis." (Emphasis added.)

This instruction, contrary to the facts of record concerning the course of business and written contractual arrangements between York Litho and the Dommerich Division, was tantamount to a directed verdict of guilty as to any billing for any work in progress under an existing obligation done by York Litho; existing obligation as defined by the Uniform Commecial Code, that is. In such a manner it deprived the Appellant of due process of law and a fair trial, was tantamount to a directed verdict of guilt and contituted plain error within the meaning of Rule 52(b), Federal Rules of Civil Procedure.

The Assignment of Accounts Receivable Contract between York Litho and Dommerich Division contained in pertinent part:

"We hereby represent and warrant as to each of said assigned receivables: that it is just, true and correct; that it represents a bona fide and existing obligation of the customer, arising out of the sale of merchandise and/or rendition of services in the ordinary course of business....

"We hereby agree that if the said receivables are not paid by each debtor when due we will pay the amount or any part thereof that remains unpaid whether or not the failure of the debtor to pay shall be for credit or any other reason...

* * *

and we further agree promptly to make payment for said returned, rejected or reconsigned merchandise ...." (Emphasis added.)

The foregoing portions of the written contractual arrangements between York Litho and the Dommerich Division patently demonstrate provision for the assigning of receivables which consist of work performed, services rendered or goods sold although not yet accepted by the customer so long as there is an obligation by York's customer. The commercial concept of "acceptance," "rejection" and existing, enforceable obligation become critical to the issue of the Appellant's guilt. They also demonstrate provision

for the "obligation" of York's customers to be determined by the ordinary course of business of York and commercial law, not the customer. Yet the court did not consider or instruct on "acceptance," "rejection," or enforceable obligation within the meaning of the Uniform Commercial Code [Florida or New York], the trade usage or custom in the printing industry or the time for seasonal cancellation of orders without liability when: (1) the customer and York never did business in the past or (2) when they have done business in the past. Such omissions left void a very technical and often difficult-to-understand portion of the law applicable to the facts and issues in the case.

The omission also elevated to the point of being crucial to the issue of the Appellant's guilt the concept of "delivery" instead of the concept of enforceable obligation. Since by the very terms of the receivable financing contract, credit back arrangements were made for "rejected" merchandise, delivery is not necessarily critical to a "bona fide and existing obligation" of the customer. Accordingly, to instruct the jury that an unquestionably bona fide order is not an "existing obligation" until delivered is legally incorrect under

the facts at bar and tantamount to a directed verdict of guilty.

More important to the issue of Appellant's guilt and the impropriety of the questioned instruction below is Uniform Commercial Code §2-201.[5/] The reason: the orders placed at York by its customers were orders for printed material each of which required certain and special sizes, paper weights, printed contents and color schemes. In view of this such were orders for specialized goods within the meaning of the Code, supra, thus creating an existing, enforceable obligation when production substantially began or York made commitments for the procurement of such goods.

In pertinent part, the Code, supra, provides:

> "(3) A contract which does not satisfy the requirements of Subsection (1) but which is valid in other respects is enforceable
>
> (a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement;

5/ The analogous Florida provision: Florida Statutes, 672.2-201.

New York case law relative to this provision of the Code, supra is sufficiently analogous to the type and character of the specialized printing work that was evidenced below so as to be dispositive on this issue. Berman Stores Co., Inc. v. Hirsch, 240 N.Y. 209, 148 N.E. 212 (1925); Goldwitz v. Kupfer, 80 Misc. 487, 141 N.Y.S. 531 (1913); E.G. Young Lumber Co. v. New York Bondstone Corp., 15 Misc.2d 985, 179 N.Y.S.2d 45 (1958); Schneider v. Lezinsky, 162 N.Y.S. 769 (1917); Morse v. Canasawacta Knitting Co., 154 App.Div. 351, 130 N.Y.S. 634, affirmed 214 N.Y. 695, 103 N.E. 1101 (1912); Meyer Bros. Drug Co., v. McKinney, 137 App. Div. 541, 121 N.Y.S. 845 affirmed 203 N.Y. 533, 96 N.E. 1122 (1910).

Since York's sales consisted of specially manufactured goods the trial court's instruction was prejudicially erroneous within the meaning of Rule 52(b), supra, and reversal is threfore required.

Additionally there was a foundation in the evidence to support a theory of defense that the Appellant believed the obligations of York's clients were existing obligations once York substantially commenced production or made a commitment for the ordered goods. (App. 6, 8, 65, 66, 70) This would have negated the

the wilfulness necessary for a conviction and the failure to instruct in the manner described above effectively deprived the Appellant of his right "to have presented instructions relating to a theory of defense for which there is any foundation in the evidence;" Perez v. United States, 297 F.2d 12, 14-15 (5th Cir. 1961); United States v. Young, 464 F.2d 164 (5th Cir. 1972); even though the evidence in that foundation may be "weak, insufficient, inconsistent, or of doubtful credibility...." Tatum v. United States, 190 F.2d 612, 617 (D.C. Cir. 1950). The "prebilling" theory should have prompted an instruction consistent with §2-201 Code, supra.

Reversal is therefore required.

POINT II.

THE GOVERNMENT'S KNOWING USE OF UNDERCOVER "AGENTS" TO SURREPTITIOUSLY ABSCOND WITH DOCUMENTS BELONGING TO YORK LITHO CORP. OF AMERICA WITHOUT A WARRANT TO SEARCH OR OTHER LEGAL BASIS TO SEIZE SUCH DOCUMENTS WAS MISCONDUCT OF SUCH MAGNITUDE AS TO DEPRIVE THE APPELLANT OF DUE PROCESS OF LAW AND REQUIRES SUPPRESSION OF THE TAINTED EVIDENCE AND REVERSAL.

A. The Remedy.

Miss Martin testified that she surreptitiously photocopied York Litho documents and secreted them from the premises while acting as an "undercover" agent for and at the direction of Special Agents of the Federal Bureau of Investigation (App. 68, 84, 87, 144). Those documents were offered and introduced against the Appellant over a defense objection.

The objectionable conduct on the part of the government agents is not overcome by the fact that Miss Martin did not abscond with the business records of York but merely copied them and secreted away the photocopies. The reason the objectionable conduct is not overcome: the government agents could not do that for which they utilized Miss Martin, not without a search warrant or other legal basis to search and seize, neither of which existed. And the unwarranted governmental invasion of privacy through "undercover agents" to accomplish what law enforcement officers could not legally and lawfully do themselves cannot be sanctioned or condoned. Neither can it be argued away. Olmstead v. United States, 277 U.S. 438, 485 (1928)(Brandeis, J., dissenting); Katz v. United States,

389 U.S. 347 (1967); caveat by Mr. Justice Rehnquist, Russell v. United States, 411 U.S. 423, 431 (1973). See also United States v. Archer, 486 F.2d 670 (2nd Cir. 1973).

Mr. Justice Brandeis, dissenting, said this in Olmstead:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

In Russell, supra, Mr. Justice Rehnquist warned that some day the court:

> "(might) be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, cf.

Rochin v. California, 342 U.S. 165...(1952)..."

411 U.S. at 431.

In the case at bar, like the facts in Archer, supra at 675, the government agents "authorized" the engagement and completion of crimes under State law. Then it offered the fruits of those crimes and the criminal activity as evidence against the Appellant. Quoting the language of the Archer court at 677:

> "It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Government 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course the courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the social interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality...."

should lend this court to treat the reprehensible, government-authorized and initiated conduct for what is - criminal - and act accordingly. In doing so it should either grant the Defendant a new trial while precluding the government from introducing the tainted

evidence or it should dismiss the few remaining counts of the indictment.

B. The Record.

The documents stolen by Miss Kelly were turned over to the Federal Bureau of Investigation in February, 1972 (App. 84). It was not until the summer of 1972 that agents for the Bureau requested Dommerich's records from Messrs. Irish and Breslow (App. 43, 45). The documents turned over to the FBI constituted almost all that remain pertinent to this cause (App. 139-140, 45). In view of the foregoing there is a substantial likelihood that the documents secreted by Miss Kelly at the agent's instruction and direction led the latter to the others exhibits previously referenced. There is also, one can deduce, a reasonable possibility that the exhibits later obtained from the bank officers affected the verdict and therefore reversal is required. United States v. Paroutian, 299 F.2d 486, 489 (2nd Cir. 1962).

Should this Court conclude that the record is not as clear as the Appellant suggests, the cause should be remanded for an evidentiary hearing to determine if the federal agents were led to the bank officers from

a source independant of the documents turned over to them by Miss Kelly. United States v. Paroutian, supra.

POINT III.

THE COURT'S FAILURE TO INSTRUCT ON THE DEFINITION OF "FALSE" AS IT IS USED IN THE PHRASE "FALSE STATEMENT OR REPORT" LEFT UNDEFINED A CRITICAL AND ESSENTIAL PHRASE IN THE LAW APPLICABLE TO THE FACTS AND ISSUES AT BAR AND DEPRIVED THE APPELLANT OF DUE PROCESS OF LAW AND A FAIR TRIAL.

During the court's charge to the jury it omitted any definition of the term "false" as it is used in the phrase "false statement or report." This omission left undefined for the fact-finders a critical and essential phrase in the law with which they were required to concern themselves.

The omission could have been obviated by the following:

> "A statement is 'false' if it is untrue when made, and was then known to be untrue by the person making it, or causing it to be made."

See generally Wilensky v. Goodyear Tire and Rubber Co., 67 F.2d 389, 390 (1st Cir. 1933); United States v. Martinez, 73 F.Supp. 403, 407 (M.D.Pa. 1947). And

without this essential definition the jury was without guidance from the court on the law applicable to the gravamen of the charge: whether the statement or report was, in fact, false.

Moreover, the failure to so instruct the jury became more accentuated when compared with the alleged instructional deficiency on the term "bona fide and existing obligation."

POINT IV.

THE COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT AND DENIED HIM DUE PROCESS OF LAW AND A FAIR TRIAL BY NOT INSTRUCTING THE JURY ON "ACCOMPLICE TESTIMONY" OF APRIL (KELLY) MARTIN AND WILLIAM DRIGGERS.

When each testified April (Kelly) Martin and William Driggers admitted forging delivery tickets which were allegedly included with and attached to various schedules of assigned receivables forwarded to the Dommerich Division in New York (App. 67-69, 142, 108, 112, 145). Assuming without conceding their veractiy and the Government's position that delivery is a necessary pre-condition to an enforceable obligation under the accounts receivable agreement between York and the Dommerich Division, these statements also

amount to admissions of criminal wrongdoing concerning the very charges in the indictment. These two assumptions would make the two witnesses accomplices of the Appellant and should have prompted the trial court to give the accomplice instruction.

The accomplice instruction approved by the Second Circuit includes the following:

> "An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect for such a witness may well have an important personal stake in the outcome of the trial. An accomplice so testifying may believe that the defendant's acquittal will vitiate expected rewards that may have been either explicitly or implicitly promised him in return for his plea of guilty and his testimony." (Emphasis added.)

United States v. Padgent, 432 F.2d 701, 704 (2nd Cir. 1970). Considering the substantial portion of the Government's case comprised of Miss Martin's and Mr. Drigger's testimony, the failure to include the accomplice instruction affected the substantial rights of the Appellant and should "be noticed" presently by the Court. United States v. Vaughan, 433 F.2d 92, 94-95 (2nd Cir. 1971); United States v. Clark, 475 F.2d 240, 248-250 (2nd Cir. 1973); United States v. Fields, 466

F.2d 119, 120-121 (2nd Cir. 1972). See also United States v. Gonzales, 488 F.2d 833 (2nd Cir. 1973) where the court's accomplice instruction was "incomprehensible" and "obviously confusing at best." Id., at 836. But cf. United States v. Tyers, 487 F.2d 828, 832 (2nd Cir. 1973)

Moreover, the cumulative effect of the instructional errors was "plain" within the meaning of Rule 52, Federal Rules of Criminal Procedure. United States v. Vaughan, Fields, and Clark, all supra.

POINT V.

THE KNOWING USE OF UNFAIR, BAD FAITH CROSS-EXAMINATION OF A DEFENSE CHARACTER WITNESS AND THE INCLUSION OF PREJUDICIALLY INFLAMMATORY AND IRRELEVANT COMMENTS IN CLOSING ARGUMENT AMOUNTED TO SUFFICIENT PROSECUTORIAL MISCONDUCT AS TO DENY THE APPELLANT DUE PROCESS OF LAW AND A FAIR TRIAL.

A. The Cross-Examination of the Character Witnesses.

During his case-in-reply, the Appellant introduced testimony of his good reputation for the character traits of honesty and decency (App. 114). The character witness was then cross-examined by the attorney for the government and asked:

> "Have you heard that on approximately ten occasions Mr. Turner carried a quarter of a million dollars in currency for Las Vegas casinos (App. 115-116)"

And after replying in the negative to that and other questions the witness was asked:

> "...have you heard that Mr. Turner is now awaiting trial on criminal charges of conspiracy in connection with the financial collapse of Cedars of Lebanon Hospital"? (App. 118)

Following Appellant's motion for mistrial the attorney for the government responded to the court thusly at (App. 124):

> "...There simply has to be a good faith basis for the Government to believe that these alleged events actually did take place."

It was prejudicially erroneous for the court to have permitted such cross-examination of the character witness without a good faith showing by the prosecutor before the questioning to determine if the target of question was an actual event. Michelson v. United States, 335 U.S. 469 (1948). Had such a hearing been held the court would have learned that the event depicted in the question, charges "in connection with the financial collapse of" a hospital, was without

factual foundation, although the Appellant concedes he was then under charges for conspiracy.[6/] The point: were the good faith hearing held the Government attorney would have been obligated to rephrase his question, omitting any incorrect and unfounded allusion to "the financial collapse of Cedars of Lebanon Hospital." Instead the Government attorney was able to allude before the jury to additional misconduct by the Appellant concerning the financial collapse of a business, an allegation not too dissimilar to those for which he was standing trial. This denied to Appellant a fair trial and due process of law. See also United States v. Duke, ___ F.2d ___ (5th Cir. Slip Op. #73-1276, decided April 12, 1974).

Secondly, while the prosecutor is entitled to inquire into the character witness' grounds of knowledge of a defendant's reputation in order to test the underpinnings for his statement ("to test qualifications of the witness to bespeak the community opinion") Michelson, supra at 483, there must be no

6/ The particular object of the conspiracy is not pertinent hereto and we are sure it is available to the court through its pre-sentence investigation.

misuse of the scope of examination in this battle of hearsay. See generally III A Wigmore, Evidence (Chadbourn ed.) §1610-1614. This means that there must be an "actual event which would probably result in some comment among acquaintances if not injury to the Defendant's reputation." Michelson, supra at 481.

Here the prosecutor's questions were without a good-faith demonstration of "actual facts" which were the object of his inquiries. Despite the form of his questions containing the phrase, "Have you heard" those questions violated the rule of Michelson and portrayed the Appellant in the eyes of the jury as a repeated manipulator of money and detractor of businesses. Such an unfounded portrayal denied him the fair trial to which he was entitled and should prompt a remand for new trial now.

B. The Closing Argument.

In his final argument the prosecutor argued to the jury:

> "First of all he said there is no evidence of personal gain to Dutch Turner. There was evidence that Mr. Turner discussed with Mr. Driggers a nest egg, or an escape fund which at the time of the discussion Mr. Turner said was $30,000 and building" (App. 125).

Although he described it as "an interesting bit of evidence" Id., there was no connection between the alleged fund and the statements to the Dommerich Division. Moreover, the record is void of any personal gain going to the Appellant from his ownership of York Litho.

Accordingly, the foregoing remark of counsel was unfair comment on the evidence, designed to arouse the passions of the jury against the defendant on evidence neither pertinent to nor "connected-up" with the facts of the case.

Shortly thereafter the prosecutor argued "that there are nineteen counts in the indictment, fifteen of them will be submitted to you for your consideration" (App. 126). This misstatement of the status of the indictment [note the Government consented to dismiss four counts (App. 708)] was unfair and, taken with other remarks set out below, can easily be interpreted as being designed to influence the jury against the Defendant with allusions to other uncharged crimes committed by him.

Another instance included:

> "We have salvaged what we have salvaged and that's what the indictment

> is about. It doesn't disprove that there were hundreds of other forged delivery tickets floating around both at the bank and at York Litho" (App. 127) (Emphasis added.)

which is likewise unfair and without factual foundation. This particular remark also implies strongly that a defendant has the burden of disproving his alleged guilt while on trial, an implication contrary to the law, and further implies "hundreds" of other acts of misconduct not charged, since each schedule sent to the bank is a separate offense.

And then the prosecutor argued,

> "Already collected means pocketed by Turner, not sent up to the bank as it was supposed to be" (App. 129).

There was not one scintilla of evidence to support such a comment; nor is there any relevant basis to remark that direct payments were "supposed to be" sent to New York. The contractual arrangement between York and Dommerich Division and their business practices called for making adjustments for direct payments. But more important: the defendant was not charged with larceny by failure to remit or bank fraud (See prosecutor's argument at App. 128) and the repeated allusions and comments concerning such possibilities

was nothing more than inflammatory rhetoric. They were certainly not "fair comment."

The law in this circuit on the parameters of prosecutorial propriety is clear. Appellant respectfully submits that the law does not sanction the repeated pattern evidenced here. See United States v. Drummond, ___ F.2d ___, Slip Op. 4697 (2nd Cir. July 5, 1973); United States v. Miller, ___F.2d ___, Slip Op. 3681, 3683-4 (2nd Cir. May 22, 1973); United States v. Fernandez, ___ F.2d ___Slip Op. 3697, 3724, n.23 (2nd Cir. May 23, 1973); United States v. Gonzales, supra.

Appellant's conviction should therefore be reversed.

POINT VI.

UNDER THE FACTS OF THIS CASE THE COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THE ALLEGED OFFENSE.

In pertinent part the within indictment stated:

> "On or about each of the dates set forth below, in the Southern District of New York...the defendants, unlawfully, wilfully and knowingly did make a false statement and report for the purpose of influencing the action of Chemical Bank, Dommerich Division...a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation...."

It went on to allege that the vehicle for allegedly false statements, etc. was an Accounts Receivable Financing Agreement then in effect between the Dommerich Division and York Litho, a business owned by the Appellant, and that the falsely listing of certain receivables on a schedule of receivables as a bona fide and existing obligation of a named customer of York constituted the "false statement" within the meaning of Title 18, United States Code, §1014.

The Dommerich Division of the Chemical Bank specializes in commercial transactions and is, in the parlance of the industry, the business money "factor" of the bank. The "factoring" of money to businesses is a high risk aspect of the banking industry which in most instances in this country, is a private, non-government field of commercial endeavor. No aspect of the Dommerich Division's efforts is government related.

Nor is the bank itself, chartered by the State of New York, government related, except for its deposits being insured by the Federal Deposit Insurance Corporation. The indictment alleging this alone fails to state an offense against the United States, the language in §1014, supra to the contrary notwithstanding.

Section 1014, U.S.Code, supra was recodified in 1948.[7/] Its predecessor sections dealt with false statements for housing and farm loans.[8/] The bill in the HOuse left out the provision, "any bank insured by the Federal Deposit Insurance Corporation," although the Report of the House Committee included that phrase. Compare H.R. Rep. No. 91-1556, 91st Cong. 2nd Sess. 1970, U. S. Code Cong. and Admin. News 5617 with the House Bill (H.R. 19436). Additionally the Senate Bill (S. 4368) contained no analogous criminal provisions. The join Conference then added the provision relating to the Federal Deposit Insurance Corporation insured banks and other government insured money institutions and agencies without even reporting a comment. Nevertheless the statute was enacted in the Housing and Urban Development Act of 1970, Pub. L. 91-609.

7/ The predecessor sections included:
7 U.S.C. 1026(a), 1514(a); 12 U.S.C. 596, 981, 1122, 1123, 1138d(a), 1248, 1312, 1313, 1441(a), 1467(a); 15 U.S.C. 616(a).

8/ Appellant is aware of United States v. Sabatino, 485 F.2d 540 (2nd Cir. 1973), cert. denied 415 U.S. 948 (1974).

But since there is no Congressional discussion concerning the inclusion of "any bank insured by the Federal Deposit Insurance Corporation" in §1014, U.S. Code, supra and since the separate House and Senate Bills omitted any such reference, Appellant submits there is no basis to conclude that Congress intended the new Act to outlaw as a federal offense the making of a false statement to a state-chartered bank insured by the F.D.I.C. Nor is there a constitutional or congressional predicate for such an expansive view of Section 1014.

Jurisdiction is also lacking because: Congress lacked the constitutional authority to enact the Act as it was and is applied and Congress did not intend the Act to cover private transactions between a business that "factored" its receivables with a division of a bank specializing in non-government, wholly private commercial transactions. This is so especially since the Act does not have its foundation in the inordinate powers constitutionally given to the Congress via the Commerce Clause of the Constitution.

Federal criminal jurisdiction will not be presumed. Any extension of such jurisdiction must be clearly

expressed in the statute. Erlenbaugh v. United States, 409 U.S. 239, 247 (1972); United States v. Bass, 404 U.S. 336 (1971); Rewis v. United States, 401 U.S. 803 (1971); United States v. Archer, supra.

In Bass, supra, Mr. Justice Marshall said at page 349:

> "(U)nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance....In traditionally sensitive areas, such as legisltation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

In Erlenbaugh the Supreme Court indicated that statutory construction should avoid producing situations in which minor state offenses would be transformed into federal felonies. Moreover, the legislative history of the statute provides "little indication of Congressional awareness of the enormous reach the statute could have if literally interpreted." Archer, supra at 678.

In view of the foregoing, the "offense charged" in the indictment is not a constitutionally authorized offense against the United States and the extension of

federal criminal jurisdiction over such conduct and over the parties to the private, non-government commercial transactions depicted in the indictment is too atenuated and without proper Congressional or Constitutional sanction. Accordingly, the judgment of conviction should be reversed.

CONCLUSION

Based on the foregoing authorities and arguments the Appellant's conviction should be reversed; alternatively this cause should be remanded for an evidentiary hearing to determine whether the government's discoverying the bank's records was tainted by the government sponsored and sanctioned illegal conduct of the prosecution witness Kelly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant was mailed postage prepaid to DOUGLAS EATON, Asst. U. S. Attorney, Office of the United States Attorney, United States Courthouse, Foley Square, New York, New York 10007 this 6th day of December, 1974.

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